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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 675

GEORGE MOORE ICE CREAM COMPANY,
Petitioner,

vs.

J. T. ROSE, Collector of Internal Revenue for the District of Georgia,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER

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I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported in 61 Fed. (2d), page 605. The opinion of the United States District Court for the Northern District of Georgia is shown in the record, pages 18 to 23.

II.

JURISDICTION.

The order of the Circuit Court of Appeals sustaining the decision of the United States District Court for the Northern District of Georgia was entered November 9, 1932. Petition for rehearing was filed November 29, 1932, and denied December 20, 1932. (R. 40, 43.) Jurisdiction is conferred upon this court by Section 240(a) of the Judicial Code as amended by the act of February 13, 1925.

The suit in the District Court by the plaintiff was for the recovery of amounts paid as additional corporation income taxes (R. 2-5), and the decisions below involve construction of said taxing acts. (R. 18-23, R. 32-38.)

Certiorari was granted by this Court March 20, 1933.

III.

SUMMARY STATEMENT OF THE CASE.

Petitioner, plaintiff in the United States District Court for the Northern District of Georgia, brought suit against the Collector of Internal Revenue for the recovery of $4,551.01 alleged to be overpayment of income taxes for the taxable year 1917. (R. 1-6.) General demurrer was filed to the amended petition which was sustained by the United States District Court on the ground that it was not alleged that protest was made at the time the additional tax in controversy was paid and on the ground of insufficiency of the claim for refund. (R. 18-23.) The court below sustained the decision of the United States District Court upon the ground of insuf-

ficiency of the claim for refund without deciding the necessity for protest. 61 Fed. (2d) 605.

The petition alleged the following facts material to the questions presented:

The original return for 1917 was filed April 1, 1918, and disclosed a loss of $21,037.25 and no tax liability. (R. 2.)

Thereafter the Commissioner, upon audit of the books determined a deficiency of $6,871.18 based upon adjustments to net income and invested capital, which was assessed in November, 1921, and paid November 5, 1923, in order to prevent the imposition of penalties, interest, and the distraint and sale of its property. (R. 3.) Thereafter on November 5, 1927, petitioner filed a claim for refund, in form and manner prescribed by law and regulations with the Collector of Internal Revenue for the District of Georgia, the material parts of which are as follows:

"6. Amount to be refunded ..... $6,871.18.

"The deponent verily believes that this claim should be allowed for the following reasons: * * *

"Fourth.

"Apparent Errors in Adjustments in Invested Capital at December 31, 1916, and in net income for 1917. * * *

"The original return for this year reflected a loss of $21,047.25. The agent made adjustments to reflect taxable gain of $16,940.18—a difference of $37,987.43.

"If the audit now being made reflects a different result, it will be submitted as additional evidence."

Thereafter on or about November 13, 1928, and January 2, 1929, and before the Commissioner had acted on the claim, detailed statements showing all the items entering into and making up net income and invested capital were duly filed with the Commissioner of Internal Revenue supplementing and supporting the claim, said statements being under oath and intended as amendments to the claim. (R. 4, 5.) After the amendments were filed the claim was referred to an Internal Revenue Agent, H. E. Smith, who on February 21, 1929, sent to the taxpayer's attorney, Wm. M. Leppard, official form 866 for the signature of the officers and fixing the tax liability at $2,322.98 and the refund due, $4,551.01. (R. 4, 7.) The claim was rejected September 8, 1929. (R. 5.)

The original claim was based upon four grounds but all were abandoned in the suit except that of over-assessment as shown on page 14 of the record.

The amended petition was filed on the 28th day of March, 1931, and does not allege payment under protest. (R. 6.) The ground on which recovery is sought is overpayment of the tax.

IV.

QUESTIONS PRESENTED.

—1—

Are the allegations concerning the claim for refund sufficient to authorize recovery under 26 U. S. C. A., Section 156 (R. S. 3226; June 2, 1924, c. 234, 1014(a), 43 Stat. 343)?

—2—

Is it necessary to allege and prove that the tax in controversy was paid under protest in order to authorize recovery?

V.

SPECIFICATION OR ERRORS.

1. The United States Circuit Court of Appeals for the Fifth Circuit erred in finding and holding that the claim for refund, and allegations in connection therewith, were not sufficient to authorize recovery under 26 U. S. C. A. paragraph 156, 43 Stat. 343.

2. The United States District Court for the Northern District of Georgia erred in finding and holding that payment under protest is a condition precedent to recovery under said section.

3. The United States District Court for the Northern Dis-

trict of Georgia erred in sustaining the General Demurrer and dismissing the petition, and the United States Circuit Court of Appeals for the Fifth Circuit erred in sustaining the court below.

VI.

APPLICABLE STATUTES.

Section 1014 Revenue Act of 1924 (June 2, 1924, 4:01 P. M. c. 234, 1014(a), 43 Stat. 343; 26 U. S. C. A. 156):

> "Sec. 1014. (a) Section 3226 of the Revised Statutes, as amended, is amended, to read as follows:
>
> " 'Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part

of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.'

"(b) This section shall not affect any proceeding in court instituted prior to the enactment of this Act."

VII.

SUMMARY OF ARGUMENT

POINT A.

The allegations concerning the claim for refund are sufficient to authorize recovery under the decision of this Honorable court in the following cases: *United States v. Memphis Oil Company*, No. 308, October Term, 1932, decided January 9, 1933, 53 S. Ct. 278; *United States v. Factors & Finance Company*, No. 141, October Term, 1932, decided January 9, 1933, 53 S. Ct. 287.

POINT B.

Payment of the tax in controversy under protest is not a condition precedent to recovery because Section 3226 Revised Statutes was amended by the Revenue Act of 1924 spcifically authorizing suit, whether or not such tax had been paid under protest or duress.

POINT C.

Congress intended this amendment to apply to suits against Collectors of Internal Revenue because it was only in such suits that payment under protest was a condition precedent to recovery.

POINT D.

Congress intended to make the amendment eliminating protest apply to all suits thereafter filed because the language used by the applicable reports clearly show that purpose. *Senate Report No.* 398, 68*th Congress, First Session, pages* 44, 45; *House Report No.* 179, 68*th Congress, First Session, pages* 33, 34. The purpose of Congress was to place taxpayers uninformed as to technical requirements upon an equality with well-advised taxpayers.

POINT E.

The prior necessity for protest did not afford the Collector of Internal Revenue any relief because under the law he was compelled to pay into the treasury of the United Stats all sums collected regardless of protest. The statute had therefore removed previously all benefit accruing to the Collector by virtue of protest. (R. S. 3210; May 10, 1916, c. 117, 1, 39, Stat. 86.)

POINT F.

The prior necessity for protest did not go to the question of the existence of the liability, and therefore the rule did not create a fixed right. *Mascot Oil Company v. United States; Heiner, Collector, v. Erie Coal and Coke Company,* 282 U. S. 434.

POINT G.

Congress had the power to create a cause of action which

had not existed before. *Sage et al. v. United States*, 250 U. S. 33; *United States v. Hvoslef*, 237 U. S. 1. Congress had such power in suits against Collectors of Internal Revenue. *Daniel Reeves, Inc., v. Anderson; Wright & Taylor, Inc., v. Lucas*, 282 U. S. 409.

VIII.

ARGUMENT.

POINT A.

Sufficiency of Claim. The original claim for refund, copy of which was attached to petition as an exhibit, and shown in the record, pages 8 to 15, sought the refund of $6,871.18 and assigned four reasons why the claim should be allowed. The fourth reason only is relied upon in the proceeding at bar. These reasons were numbered "First," "Second," "Third" and "Fourth." The fourth reason urged for the allowance of the claim was on the ground "Apparent Errors in Adjustments in Invested Capital at December 31, 1916, and in Net Income for 1917."

The first paragraph under this heading dealt with errors in the invested capital setting forth in detail certain items asserted to have been erroneously eliminated. The second paragraph dealt with the question of net income pointing out that the original return revealed a loss of $21,047.25 and that the agent had made adjustments to reveal a profit of $16,940.18. The final paragraph stated that an audit was being made, and that if same reflected a different result it would be submitted as additional evidence.

Paragraph 10 of the petition alleges that detailed statements constituting amendments to the claim were filed prior to the rejection of the claim, and that these detailed statements disclosed all of the items entering into and making up net income. (R. 4.) The succeeding paragraph of the petition alleges that this claim for refund together with the amendments was referred to Revenue Agent H. E. Smith for verification and that he determined that petitioner was rightfully entitled to a refund of $4,551.01. (R. 4.) His letter shows the correct tax liability to be $2,322.98 and that the tax previously assessed was $6,873.99 and that petitioner was due a refund of $4,551.01. (R. 7.)

It is believed that the facts in the case at bar bring it within the ambit of the decisions of this court in *United States v. Factors & Finance Company*, 53 S. Ct. 287, and *United States v. Memphis Oil Company*, 53 S. Ct. 278, and that therefore the allegations concerning the claim for refund are sufficient.

POINT B.

The petition does not contain any allegation that the tax in controversy was paid under protest. It is assumed that if protest is a condition precedent to recovery it must ba alleged and proved and that it is not an affirmative defense to be pled by the defendant. The tax in controversy was paid prior to the enactment of the Revenue Act of 1924 on November 5, 1923, and the suit was filed after the passage of the Revenue Act of 1924. It is our position that the amendment to Section 3226 made by the Revenue Act of 1924 removed the necessity of petitioner to allege and prove protest,

and definitely authorized the maintenance of the suit whether or not such tax had been paid under protest or duress. The section as re-enacted by the Revenue Act of 1924 as Section 1014 of that act contained the following provision which was not previously included in Revised Statutes 3226: "But such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress." (June 2, 1924, 4.01 P. M., c. 234, 1014 (a) 43 Stat. 343.) By sub-section (b) of the same section it was provided that the Revised Statutes 3226 as re-enacted by that section should not apply to pending suits. It is thought that the language used in this amended section of the Revised Statutes definitely authorized the maintenance of this suit although the tax was not paid under protest. The language will admit of no other reasonable construction.

The contention that the amendment to Section 3226 Revised Statutes removed the necessity to allege and prove duress and protest is sustained by the language used by the United States Circuit Court of Appeals for the Second Circuit in the case of *Daniel Winant et al. v. Gardner, Collector,* 29 Fed. (2d) 836, in which that court used the following language: "In 1924, Congress (Section 1014 (a), Revenue Act of 1924), amended Revised Statutes Section 3226 by providing that in suits against Collectors the plaintiff need not prove duress and protest, but sub-division (b) of the amending section makes it inapplicable to pending actions. The harsh rule, of which Fox v. Edwards, 287 Fed. 689 is a late illustration, therefore remained in force as respects the action at bar. In spite of the injustice of the result we can find no escape." That proceeding was pending when the Revenue Act of 1924

was passed and was therefore controlled by sub-section (b) of the amending section. While the court affirmed the judgment below, the concluding sentence of the decision clearly reflects the court's opinion in which it says: "Happily such a situation can no longer arise, but we have no power to compel the defendant to concede what justice would seem to demand."

POINT C.

Undoubtedly Congress intended the amendment to Section 3226 R. S. to apply in suits against Collectors of Internal Revenue.

The Court of Claims has definitely held that, in suits to recover income taxes brought against the United States, protest was not a necessary condition precedent to recovery. The Court of Claims, in *Farmers Loan and Trust Company et al. v. The United States*, decided February 20, 1928, 64 Ct. Claims 516 and in the case of *Hyatt Roller Bearing Company v. United States*, 43 Fed. (2d) 1008, held that Section 252 of the Revenue Act of 1918 (40 Stat. 1085) is mandatory in its provision that any overpayment of tax shall be refunded or credited and that Sections 1316 and 1318 of the Revenue Act of 1921 (42 Stat. 314; 26 U. S. C. A. 156, 157) authorized suits for refund if claims for refund are filed, and that under those sections and Section 145 of the Judicial Code (28 U. S. C. A. 250) the right to maintain the suits and the authority of the court to render judgments for refunds can not be made to depend upon whether the tax was paid under protest.

Section 3226, Revised Statutes, has been universally held

by all of the courts to apply in suits against Collectors of Internal Revenue. In one of the earlier cases, if not the earliest case, decided by this Honorable Court, *Cornelius Brainard, Collector of Internal Revenue, v. Henry G. Hubbard,* 12 Wall. 1-18, 79 U. S. 1, decided April 10, 1871, not only held that the section applied in a suit against a Collector of Internal Revenue but also held that the section applied retroactively to payments theretofore made, but did not apply to suits commencing prior to the enactment of the section. In that case the court also held that a suit against a Collector of Internal Revenue was one of the remedies necessarily implied from the acts of Congress for the recovery of taxes erroneously paid, and that such remedies may be changed or modified at the pleasure of the lawmaker.

POINT D.

The history of the amendment to Section 3226 Revised Statutes shows clearly that Congress intended to apply the amendment to all suits thereafter filed. The report of the Committee upon Ways and Means of the House (*House Report* No. 179, 68th Congress, First Session, pages 33 to 34) and the report of the Finance Committee of the Senate (*Senate Report* 398, 68th Congress, First Session, page 44), both show the following:

> "Section 1114. The provisions of Section 1318 of existing law have been amended to provide that after the enactment of the bill it shall not be a condition precedent to the maintenance of a suit to recover taxes, sums, or penalties paid, that such amounts shall have been paid under protest or duress. The fact protest was made has little bearing on the question whether the tax was prop-

erly or erroneously assessed. The making of such a protest becomes a formality so far as well advised taxpayers are concerned and the requirement of it may operate to deny the just claim of a taxpayer who was not well informed."

The conclusion is necessarily implied from Sub-section (b) of Section 1014 of the Revenue Act of 1924, that the amended section should apply to all suits thereafter commenced. The sub-section provides, "This section shall not affect any proceeding in court instituted prior to the enactment of this act." Had Congress intended to exempt payments made prior to the passage of the act, undoubtedly language to that effect would have been used. Sub-section (b) necessarily implies that the amended section 3226 shall apply to all suits thereafter commenced. It is obvious that the framers of the amendment believed, in the absence of this sub-section, that it would have applied even to pending suits.

We submit that the language used by Congress in the amendment, and in the reports of the Committee on Ways and Means of the House, and the Finance Committee of the Senate, unquestionably indicated the intention of Congress to make the amendment immediately effective to correct well recognized evils of the existing rule, and to relieve taxpayers, who, under the unsettled construction of the income tax provisions, were not well advised and could not have been apprised of the amunts due. The many decisions of this court attest the many complex questions arising under the various revenue acts. It seems certain that it was the purpose of Congress to permit taxpayers to recover amounts erroneously paid, and to relieve them from unnecessary technical handicaps.

POINT E.

The common law rule requiring protest as a condition precedent to recovery in suits against tax collectors obviously was for the protection of tax collectors in order that the money might be held out of the public treasury until the question could be adjudicated. The rule constituted substantial protection to tax collectors. But in the case of Collectors of Internal Revenue the applicable statutes definitely require all taxes collected by them to be paid into the treasury of the United States daily regardless of whether or not the payment is made under protest. (R. S. 3210.) It follows, therefore, that the Collector of Internal Revenue, the defendant below, is in the identical position now with respect to the payment of a judgment upon the case at bar as he would have been if the tax had been paid under protest. Under the facts as alleged in the petition a certificate of probable cause would follow as a matter of course. It is alleged that the tax was regularly assessed upon an audit made by the Commissioner of Internal Revenue and it is believed that no court, under the facts alleged, would decline such a certificate.

It is true that this is an action against a Collector of Internal Revenue and that he at least has a technical interest in the case, but that interest is too insubstantial and remote to affect the application of the amended Section 3226, Revised Statutes. The case at bar is essentially a matter between the United States and one of its citizens. When the United States promulgates a rule that it will not insist upon duress and protest as a condition precedent to the recovery of money, which by hypothesis it ought not to keep, it seems clear that the policy so declared should be taken as immediately effective.

The personal interest of the Collector of Internal Revenue has been amply protected by the United States by authorizing the Commissioner of Internal Revenue to repay to any Collector the full amount of such sums of money as may be recovered against him in any court, with the costs and expense of suit. (26 U. S. C. A. 149; R. S. 3220). It is therefore submitted that the Collector of Internal Revenue has no substantial interest in the proceeding at bar. We believe that this principle was recognized by this court in *Graham et al v. Goodcell* and related cases, decided January 26, 1931, (282 U. S. 409). Those cases involved a construction of Section 611 of the Revenue Act of 1926, and used this language: "Nor is there any warrant for making any distinction in this respect between suits which had been brought against the Collector individually, and those pending against the United States."

POINT F.

It is believed that the rule existing prior to the enactment of the Revenue Act of 1924 making protest a condition precedent to the recovery of income taxes in proceedings against Collectors of Internal Revenue did not go to the question of the existence of the liability, and therefore did not create a fixed right which could not be changed by Congress. This court in the case of *Graham et al. v. Goodcell*, 282 U. S. 409, said:

"It is apparent, as the result of the decision, that a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention, and the case of a curative statute

aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applid without injustice. Where the asserted vested right, not being linked to any substantial equity, arises from the mistake of officers purporting to administer the law in the name of the Government, the legislature is not prevented from curing the defect in administration simply because the effect may be to destroy causes of action which would otherwise exist."

It is believed the principle above quoted should, in equity, be applied to the case at bar because admittedly the Government has collected money from petitioner in excess of the amount regularly due. The same principle was followed in *Mascot Oil Company v. United States*, 282 U. S. 434.

The case at bar is similar in some respects to the case of *United States v. Hvoslef*, 237 U. S. 1. In that case a claim for refund was filed under act of July 27, 1912, for stamp taxes paid prior to that time. The payment was made without protest; it had been certified by the Collector to be correct in its statement of facts but the Commissioner of Internal Revenue had rejected it for the reason that the act was not applicable. It would appear from the case that the payment was made before the passage of the act and the suit filed after the passage of the act. The court held that the act was applicable not only where such taxes were paid before the refunding act was passed but also where subsequently they were wrongfully collected in violation of its provisions.

DECISIONS OF LOWER COURTS.

The following decisions of lower courts sustain the contention that the amendment to Section 3226 eliminating the necessity for protest applied to all suits thereafter filed regardless of prior payment. *Weir v. McGrath,* 52 Fed. (2d) 201; *Electric Storage Battery Company v. McCaughn,* 52 Fed. (2d) 205; *Warner v. Walsh,* 24 Fed. (2d) 449; *Beatty v. Heiner,* 10 Fed. (2d) 390; *Leach v. Nichols,* 42 Fed. (2d) 918;*Winant v. Gardner,* 29 Fed. (2d) 836.

CONCLUSION.

It is therefore respectfully submitted that the decision of the court below should be reversed.

J. C. MURPHY,

Counsel for Petitioner.

April 8, 1933.